FCC 94-191

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	GN Docket No. 93-252
Implementation of Sections 3(n) and 332	)	
of the Communications Act	)	
	)	
Regulatory Treatment of Mobile Services	)	

SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: July 18, 1994 Released: July 20, 1994

Comment Date: August 9, 1994
Reply Comment Date: August 19, 1994

By the Commission:

I. INTRODUCTION

1. In a prior Further Notice of Proposed Rule Making in this docket, the Commission requested comment on whether it should establish a general cap on the amount of commercial mobile radio service (CMRS) spectrum for which an entity may be licensed in a particular geographic market.[1] The purpose of that proposal is to ensure that no CMRS provider will exert market power by controlling large amounts of spectrum in a given geographic market. Additionally, the *Spectrum Cap Notice* sought comment on rules for administering a spectrum cap, if the Commission adopted a spectrum aggregation limit. The *Spectrum Cap Notice* invited comments on whether the Commission should apply personal communications services (PCS) spectrum aggregation and cellular-PCS cross ownership

[1] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Further Notice of Proposed Rule Making, FCC 94-100 (released May 20, 1994) (*Spectrum Cap Notice*).

attribution standards, adopted in the *Broadband PCS Order,*[2] to a general CMRS spectrum cap.

2. On June 13, 1994, the Commission released an Order reconsidering and clarifying the rules for broadband PCS. The *Broadband PCS Reconsideration Order* retained certain limitations on the amount of PCS spectrum that can be obtained in any geographic service area. Generally, an entity may acquire attributable interests in a maximum of 40 MHz of licensed broadband PCS spectrum. Parties with attributable cellular interests, however, may obtain only 10 MHz of licensed broadband PCS spectrum if the population in the cellular service area overlaps 10 percent of the population in the relevant PCS market. In addition, after January 1, 2000, entities with attributable cellular interests may acquire an additional 5 MHz of broadband PCS spectrum, for a total of 15 MHz of PCS spectrum in their cellular service areas. The *Broadband PCS Reconsideration Order* also specified certain interests that the Commission would consider attributable interests in order to determine the maximum amount of PCS spectrum for which an entity may be licensed.[3]

3. On June 29, 1994, the Commission adopted an Order establishing competitive bidding procedures for broadband PCS.[4] The Commission adopted a "Competitive Opportunity Plan" in the *Broadband PCS Auction Rules Order*, under which "entrepreneurs' blocks" are established as a means of fulfilling the statutory mandate to ensure that businesses owned by minorities or women (or both), small businesses, and rural telephone companies[5] are provided with full opportunities to participate in providing broadband PCS services. The Competitive Opportunity Plan, *inter alia*, establishes installment payment plans for applicants eligible for entrepreneurs' block licenses, and also establishes a system of bidding credits for small businesses and businesses owned by minorities or women (or both).

4. The purpose of this Second Further Notice is to explore whether the Commission should consider certain additional non-equity relationships to be attributable interests for purposes of applying the 40 MHz limitation on PCS spectrum, the PCS-cellular cross-ownership rules, or a more general CMRS spectrum cap. In addition, we seek comment regarding whether any attribution rules we adopt in this proceeding should apply

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[2] Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700 (1993) (*Broadband PCS Order*), *recon.*, Memorandum Opinion and Order, FCC 94-144 (released June 13, 1994) (*Broadband PCS Reconsideration Order).*

[3] *Broadband PCS Reconsideration Order,* at paras. 98-140.

[4] *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, FCC 94-178 (adopted June 29, 1994)(*Broadband PCS Auction Rules Order*).

[5] These various entities are collectively referred to as "designated entities."

differently depending on whether the applicant or licensee involved is a designated entity. We also seek comment regarding how such non-equity relationships should be construed in the context of determining whether the designated entity has *de facto* and *de jure* control of the licensee. Finally, commenters should address how such relationships in the designated entity context balance the need to allow designated entities to attract needed expertise, capital and infrastructure while avoiding the creation of fronts or shams.

II. DISCUSSION

5. One of the purposes of this proceeding is to examine resale agreements,[6] management contracts, joint marketing agreements, and other similar arrangements for the purpose of determining whether these arrangements should be treated as attributable interests in applying the PCS spectrum aggregation cap, the PCS-cellular cross-ownership restrictions, or a general CMRS spectrum cap. We recognize at the outset that any agreement that confers on a party other than the licensee *de facto* control over an FCC-licensed facility will be considered an attributable interest.[7] Therefore, commenters should address whether there are relationships, not included in the PCS attribution rules, that do not rise to the level of control, but nonetheless should be considered attributable because these interests may affect the incentive or ability of PCS and other CMRS licensees to compete vigorously in the marketplace, or because they may affect the number of effective competing providers or the independence of pricing decisions by service providers.

A. Management Agreements

6. We request comment on whether management agreements or similar arrangements that do not confer *de facto* control on a party other than the licensee should be considered attributable interests. We are concerned, for example, that a management agreement may permit the manager access to market sensitive information (*e.g.*, business

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[6] For this purpose, resale arrangements include arrangements characterized as "capacity leasing agreements" between private carriers who will be treated as CMRS providers as of August 10, 1996, and their customers.

[7] We note, of course, that any such agreement conferring *de facto* control would violate Section 310(d) of the Act if the agreement has not been disclosed and approved by the Commission. Issues of *de facto* control will be determined pursuant to existing precedent. *See generally* Intermountain Microwave, 24 RR 983 (1963)(*Intermountain*); Cellular Control Notice, 1 FCC Rcd 3 (1986); News International, PLC, 97 FCC 2d 349 (1984); Loraine Journal v. FCC, 351 F.2d 824, 828 (D.C.Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). *See also* Public Notice, Common Carrier Public Mobile Services Information, "Mobile Services Division Releases Guidance Regarding Questions of Real Party in Interest and Transfers of Control for Cellular Applications," Report No. CL-93-141, Sept. 22, 1993; Public Notice, Common Carrier Public Mobile Services Information, "Mobile Services Division Releases Guidance Regarding Questions of Real Party in Interest and Transfers of Control for Cellular Applications in Markets Beyond Top 120," Report No. CL-87-1, Oct. 2, 1986.

plans, customer lists, product and service development, marketing strategies); if the manager is also a licensee offering a competing service, access to this information might enable it to impede vigorous competition. We also seek comment regarding the issue of whether such management agreements, although not amounting to *de facto* control, may involve levels of integration between the managed licensee and the manager's company which have the effect of reducing competitive choices in the marketplace or of creating a sham or front corporation to take advantage of designated entity provisions.

7. By way of background, we note that we have established several criteria that we have determined to be probative with regard to the issue of whether a licensee, through management agreements or other means, and in contravention of our rules, has relinquished control of and responsibility for its licensed facilities. These criteria, first articulated in *Intermountain*, include the following questions:[8]

- Does the licensee have unfettered use of all facilities and equipment? If the licensee retains such use, this will support a finding that the licensee has not relinquished control to a third party through a management agreement or other arrangement.

- Has the licensee relinquished control of daily operations? Retention of such control by the licensee contributes to a finding that the licensee has not relinquished control over the licensed facilities.

- Does the licensee determine and carry out policy decisions, including the preparation and filing of applications with the Commission? If it is demonstrated that the licensee has retained control of policy decisions, this serves as another contributing factor in determining that the licensee has not relinquished control of its licensed facilities to a third party.

- Is the licensee in charge of employment, supervision, and dismissal of personnel? Retention of control over such personnel matters would tend to support a conclusion that the licensee has not relinquished control to a third party through a management agreement or other arrangement.

- Is the licensee in charge of the payment of financing obligations, including expenses arising out of operation of the licensed facilities? If the licensee has retained responsibility for such expenses, such retention of control will be taken into account in determining whether the licensee has relinquished control of its facilities to a third party.

- Does the licensee receive monies and profits derived from operation of the

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[8] *See Intermountain*, 2 Rad.Reg. (P&F) at 984.

licensed facilities? Again, the role of the licensee with regard to receipt of profits and other monies is one of the determining factors with regard to whether the licensee has relinquished control of its facilities to a third party through a management agreement or other arrangement.

In this proceeding our purpose is to examine whether management agreements which do *not* involve any relinquishment of control under the *Intermountain* test still should be deemed to confer attributable interests to the managing party under the agreement. We seek comment on this issue.

8. In particular, commenters should address the following questions. First, could management agreements be structured in such a way that the manager's access to the type of information described in the preceding paragraph would not necessarily have any adverse effect on competition? Commenters should address the specific components of such management agreements, and discuss how these components would protect against anti-competitive effects. Commenters also should address whether examination of such management agreements would require an unreasonable expenditure of Commission staff and other resources and whether there are effective alternatives to such a review procedure that would address our concern.

9. Second, should a management agreement be treated as an attributable interest in all cases, including the PCS spectrum aggregation cap, the PCS-cellular cross-ownership restrictions, and any overall CMRS spectrum aggregation cap the Commission may establish in this docket? In addressing this question, commenters should explore any factors and considerations that would support a conclusion that treatment of a management agreement as an attributable interest would be necessary or appropriate in certain of these cases, but not in others.

10. Third, if we conclude that management agreements or similar arrangements should be treated as attributable interests, what administrative rules would be necessary to enforce such a rule? Would reporting requirements be necessary to enable the Commission to record and monitor instances in which CMRS licensees enter into management agreements for the operation of their systems? For example, in the SMR industry, some private radio licensees have entered into agreements that permit a third party manager to use the system's entire capacity.[9] Although we have reclassified interconnected wide area SMRs as CMRS, SMRs licensed as of August 10, 1993 will continue to be regulated as PMRS during the transition period and SMRs that are not interconnected will remain PMRS. We seek comment on how we should treat such arrangements for purposes of attribution.

11. Finally, if we conclude that management agreements or similar arrangements should be treated as attributable interests, how should our rules apply in the case of

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[9] These agreements are not submitted to the Commission for our review.

designated entities? Specifically, we seek comment regarding the following issues: Are there policies or other considerations that would warrant applying management contract attribution rules differently in the case of designated entities? Should management agreements be attributable for purposes of application of the 10 percent cap relating to entrepreneurs' block licenses? Should management contracts affect eligibility for provisions provided for designated entities?

B. Resale

12. Similarly, we request comment on whether any resale agreements should be considered an interest attributable to a repeller in the context of a PCS spectrum aggregation cap, PCS-cellular cross-ownership restrictions, or a general CMRS spectrum cap. The Commission has defined resale as an "activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications service to the public (with or without 'adding value') for profit."[10] We have required cellular licensees to provide resale, except that a cellular licensee may restrict resale by a facilities-based competitor after the competitor has been licensed for five years.[11] We note that resellers of commercial mobile radio services have been classified as CMRS providers,[12] and they may offer services that compete with other commercial mobile radio services.

13. In most instances, we are not concerned that a reseller could exercise effective control over the spectrum on which it provides service or have the ability to reduce the amount of service provided over that spectrum because other resellers could enter into such resale arrangements. Under these circumstances, we see no reason to attribute the spectrum of the underlying service provider to resellers for purposes of spectrum caps. Some parties, however, have expressed concern that resale agreements may be used to circumvent the

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[10] Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Docket No. 20097, Report and Order, 60 FCC 2d 261, 271 (1976).

[11] Petitions for Rule Making Concerning Proposed Changes in the Commission's Cellular Resale Policies, CC Docket No. 91-33, Report and Order, 7 FCC Rcd 4006 (1992). In addition, the Commission has recently adopted a Notice of Inquiry requesting comment on whether the Commission should require some or all CMRS providers to allow resale of their services. The Notice also seeks comment on what CMRS providers would constitute facilities-based competitors in the same service area. *See* Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, CC Docket No. 94-54, Notice of Proposed Rule Making and Notice of Inquiry, FCC 94-145 (adopted June 9, 1994).

[12] The Commission has found that mobile resale service is included within the category of mobile service, and thus resale of a CMRS would meet the definition of a CMRS. *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1425 (1994)(*CMRS Second Report and Order*), *recon. pending*.

spectrum caps. In the context of common carrier regulation, it seems unlikely that any resale agreement short of a transfer of control could reduce the quantity of service available to the public. As a result, we currently do not think that resale agreements should be considered attributable interests, but we invite comments from parties that believe there are competitive concerns.

C. Joint Marketing Agreements

14. We also request comment on whether joint marketing agreements should constitute an attributable interest in the context of a PCS spectrum aggregation cap, PCS-cellular cross-ownership restrictions, or a general CMRS spectrum cap. Under a joint marketing agreement, two or more CMRS providers would pool their resources to market their services to consumers. One aspect of this joint venture may be to market the services of various CMRS providers under a common name. We believe that such joint ventures may be beneficial to both licensees and consumers because of the savings that could be realized by pooling resources for advertising and direct sales. These savings could then be passed on to the consumer.

15. The Commission previously examined whether to limit various joint ventures in the context of our broadcast ownership rules.[13] In that context, the Commission examined joint advertising sales, shared technical facilities, and joint programming arrangements (or "time brokerage"). We noted that such joint ventures are not precluded by any Commission rule or policy so long as the Commission's ownership rules are not violated and the participating licensees maintain ultimate control over their facilities.[14] The Commission did not impose any additional restrictions on operational joint venture arrangements, but noted that all broadcast licensees are subject to compliance with the antitrust laws and maintenance of editorial control.[15] The Commission, however, did limit time brokerage arrangements in the same local market so that:[16]

> where an individual or entity owns or has an attributable interest in one or more stations in a market, time brokerage of any other station in that market form more than 15 percent of the brokered station's broadcast hours per week will result in counting the brokered station toward the brokering licensee's permissible

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[13] Revision of Radio Rules and Policies, MM Docket No. 91-140, Report and Order, 7 FCC Rcd 2755, 2784-89 (*Radio Ownership Rules*), *recon.*, 7 FCC Rcd 6387, 6400-02 (1992) (*Reconsideration of Radio Ownership Rules*).

[14] *Radio Ownership Rules,* 7 FCC Rcd at 2784.

[15] *Id.* at 2787.

[16] *Id.* at 2788.

ownership totals under the revised local ownership rules.

16. As explained in *Radio Ownership Rules,* our rules or policies do not prohibit joint marketing ventures so long as a licensee maintains *de facto* control over the licensed facilities and complies with the antitrust laws. In the context of CMRS or PCS joint ventures, we need not concern ourselves with programming diversity because CMRS providers are, by definition, common carriers and have no control over content. We believe that there may be benefits to consumers from these joint marketing ventures. We are concerned, however, that such arrangements may provide competitors access to information, or have other anticompetitive effects, that could impede vigorous competition.[17] Therefore, commenters should address whether a licensee who enters into a joint marketing venture with one or more licensees whose geographic market areas have an overlap of 10 percent of the population should have the interest of the other joint venture licensees attributed to it for purposes of the PCS aggregations limits, the cellular-PCS cross-ownership rules, or a general CMRS spectrum cap. In addition, if the Commission finds such arrangements to be attributable interests, commenters should address whether we should adopt different rules relating to designated entities.[18]

III. PROCEDURAL MATTERS

A. *Ex Parte* Rules -- Non-Restricted Proceeding

17. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 CFR §§ 1.1202, 1.1203, 1.1206(a).

B. Initial Regulatory Flexibility Analysis

18. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* (1981), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of the policies and rules proposed in this *Further Notice* on small entities. The IRFA is contained in Appendix A to this *Further Notice*. The Acting Secretary shall cause a copy of this *Further Notice*, including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

C. Comment Period

19. Interested persons may file comments in this proceeding on or before August

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[17] *See, e.g.*, para. 5, *supra.*

[18] *See* para. 15, *supra.*

9, 1994, and reply comments on or before August 19, 1994. For filing requirements, *see generally* 47 CFR §§ 1.415, 1.419. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting materials. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington D.C. 20554. In addition, commenters are requested to submit courtesy copies to the Chief, Mobile Services Division, Common Carrier Bureau, 1919 M St., N.W., Room 644, Washington, DC 20554, and to the Deputy Chief, Land Mobile and Microwave Division, Private Radio Bureau, 2025 M St., N.W., Room 5202, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) at the Commission's headquarters at 1919 M Street, N.W., Washington, D.C.

D. Further Information

20. For further information regarding this *Further Notice,* contact Greg Rosston at (202) 418-2030 (Office of Plans and Policy) or Leila Brown at (202) 418-1300 (Common Carrier Bureau, Mobile Services Division).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Initial Regulatory Flexibility Act Analysis

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA.

Reason for Action

This rule making proceeding was initiated to seek comment with regard to whether management agreements and resale arrangements should be treated as attributable interests for purposes of application of the Commission's rules relating to (1) the personal communications service (PCS) spectrum aggregation cap; (2) the PCS-cellular cross-ownership restrictions; (3) any overall commercial mobile radio service (CMRS) spectrum aggregation cap the Commission may establish in this docket; and (4) control of a designated entity.

Objectives

The principal objective of the *Further Notice* is to promote vigorous competition in the CMRS marketplace through the development of attribution rules that prevent any CMRS licensee from gaining an unfair competitive advantage.

Legal Basis

The proposed action is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), and Sections 3(n), 4(i), 303(r), 309, 332(c), and 332(d) of the Communications Act of 1934, 47 U.S.C. §§ 153(n), 154(i) and 303(r), 309, 332(c), and 332(d), as amended.

Reporting, Recordkeeping, and Other Compliance Requirements

The proposals under consideration in the *Further Notice* may impose certain new reporting and recordkeeping requirements on mobile services licensees.

Federal Rules Which Overlap, Duplicate, or Conflict with These Rules

None.

Description, Potential Impact, and Number of Small Entities Involved

Many small entities could be affected by the proposals contained in the *Further Notice*. Depending on the final resolution of the issues, regulations affecting the licensing, recordkeeping, and reporting obligations of numerous mobile services providers may be changed. The full extent of these changes cannot be predicted until various other issues

raised in the proceeding (*e.g.*, whether a CMRS spectrum cap will be established by the Commission) have been resolved. After evaluating the comments filed in response to the *Further Notice*, the Commission will examine further the impact of all rule changes on small entities and set forth its findings in the Final Regulatory Flexibility Analysis.

Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The *Further Notice* solicits comment on a variety of alternatives. Any additional significant alternatives presented in the comments will also be considered.

IRFA Comments

We request written public comment on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided in paragraph 13 of the *Further Notice*.